AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Elections and Political Parties

**John Eastman, Memo on Decertifying Electoral Votes** (2020)

*The 2020 presidential election was hotly contested and rendered all the more unusual by the effects of the global pandemic. States altered their voting procedures to accommodate a wider range of voting methods and a more extended process of counting votes. Although public opinion polls had suggested through the Trump presidency that he would struggle to assemble an electoral majority to win reelection, he nearly managed to pull off the same feat that he did in 2016 and win narrow majorities in just the right states to pull off a victory in the Electoral College. Nonetheless, by late in the night on Election Day it was evident that the president had failed to repeat history and pull off the upset victory over his Democratic rival.*

*President Trump and his most ardent supporters refused to concede defeat, however. The Trump campaign launched an unprecedented effort to overturn the apparent election results in the weeks following the election. Those efforts repeatedly met failure, but the president eventually landed on one last option. On January 6, 2021, the two chambers of Congress would meet in joint session to perform their duty under the Twelfth Amendment to count the votes cast by the presidential electors on December 14, 2020. The Twelfth Amendment dictates that, “the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and votes shall then be counted.” Republican Representative Louie Gohmert had filed a federal lawsuit seeking to judicial declaration that the vice president could unilaterally refuse to count votes from any state’s slate of presidential electors, but the suit was rejected. President Trump and his attorneys lobbied Vice President Mike Pence to accept that theory and reject a sufficient number of Democratic votes to give Trump the victory. When the day for counting the electoral votes arrived, the president held a rally outside the Capitol demanding that Congress “stop the steal.” When hundreds of those rally attendees stormed the Capitol building to stop the vote count, President Trump tweeted that “Mike Pence didn’t have the courage to do what should have been done.” That tweet spurred Twitter to remove several of Trump’s posts and eventually to permanently suspend his account.*

*In the days leading up to the January 6 counting of the electoral votes, John Eastman provided an opinion letter to Republican state legislative leaders emphasizing that they had the constitutional power to “decertify” their state’s electoral votes and submit an alternate slate of electoral votes to Congress to be counted. Eastman was a law professor at Chapman University and was the most distinguished member of the legal team that had been advocating on the president’s behalf since election night. Eastman spoke at the January 6 rally outside the Capitol, and he laid out the legal case to Pence that held that the vice president had the authority to set aside state ballots that had been cast for Biden. As the riot delayed the congressional vote of the electoral votes on January 6, Trump allies continued to urge state legislatures to decertify their Biden votes and replace them with Trump electoral votes. The Eastman letter argued that even if Congress declared Biden the winner of the election on January 6th, the outcome of the presidential election could still be changed up to and* even after *Biden was inaugurated if legislatures determined that the election was “fraudulent.” In the days after January 6, Eastman sent an email to another Trump lawyer, former New York City Mayor Rudy Giuliani, saying “I’ve decided that I should be on the pardon list, if that is still in the works.”*

*This particular letter was addressed to Timothy Ramthun, a member of the Wisconsin state legislature, and was among the documents collected by the congressional Select Committee to Investigate the January 6th Attack on the United States Capitol. Five days after Joe Biden was inaugurated as president, Ramthun introduced a resolution in the state legislature to decertify and “reclaim” the Wisconsin electoral votes from the 2020 election, but Republican state legislative leaders called it “just plain unconstitutional” and refused to schedule a vote on the resolution. In the spring of 2022, a “special counsel” hired by the Republican leadership in the Wisconsin legislature issued a report that concluded that even in 2022 the legislature could “decertify” the state’s 2020 electoral votes, but admitted that “this action would not, on its own, have any other legal consequence under state or federal law. It would not, for example, change who the current President is.”[[1]](#footnote-1)*

Re: Decertification of Elector Votes

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While I acknowledge that the question posed of me places us in unchartered territory, my conclusion is that the state legislatures, which exercise plenary authority under Article II of the United States Constitution to direct the manner for choosing presidential electors, do have the authority to de-certify the election of presidential electors in their state upon a definitive showing of illegality and/or fraud in the conduct of the election sufficient to have altered the results of the election. In my judgement, that conclusion holds true following each of the five relevant events described below, even while I acknowledge that the counter arguments increase in strength with each successive event. Those events are:

1. Certification of the election at which the electors are chosen by popular vote, according to state law;
2. The “safe harbor” date specified in 3 U.S.C. § 5, pursuant to which the final determination of any election contest shall be deemed “conclusive” if done according to procedures set out in state law prior to the election. . . .
3. The date specified by 3 U.S.C. § 7 for electors to meet and cast their votes. . . .
4. The opening by the Vice President and counting of elector votes in the presence of the joint session of Congress. . . .
5. The inauguration of the President. . . .

Article I, Section 1, Clause 2 of the U.S. Constitution provides, in relevant part, that "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." The Supreme Court has described the constitutional authority of the state legislatures to determine the manner of choosing electors as "plenary." It has even noted that, "whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power *at any time*." *McPherson v. Blacker* (1892).

In the early decades of our nation's history, most state legislatures selected the state's presidential electors themselves; only after 1824 did the majority of state legislatures provide for choosing electors by popular election. Nevertheless, the constitutional power to decide on the method for choosing electors remains exclusively with state legislatures.

To be sure, the authority to take back the power of appointing electors "at any time," as the Supreme Court recognized in the *McPherson* case, would likely not allow the Legislature to pick its own slate of electors *after* the results of a legal and fair election which had been conducted pursuant to the Legislature's existing statutory procedures, merely on the grounds that the Legislature would have preferred a different outcome. *Bush v. Gore* (2000). But such is not the case when the existing election laws – the manner" chosen by the Legislature - are altered or ignored. In such cases, the "manner" for choosing electors set out by the Legislature was not followed; the constitutional default of the Legislature exercising its plenary power – or, rather, resuming that power – is therefore again at the forefront.

. . . . The intermingling of illegal with legal ballots in significant enough numbers that the election cannot be validly certified, means that the State "has failed to make a choice" on election day, and the appointment of electors therefore devolves back on the Legislature of the State, which has plenary power to decide whether to exercise that appointment power itself, or to craft some other mechanism for appointing the State's slate of electors.

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Violations of state election law which is to say, the "manner" that the Wisconsin Legislature had established for the choosing of President electors are numerous. Here are some of the most obvious:

* Wis. Stat. § 6.86, which requires applicants for an absentee ballot to submit voter identification unless they are "indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." County clerks in Dane and Milwaukee falsely notified voters in those counties that fear of Covid would qualify, and therefore accepted absentee ballot applications without the statutorily-required voter identification.
* Wisc. Stat. § 6.87(4)(b)(1), which mandates that absentee ballots shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Election officials in Dane County allowed for absentee ballots to be returned to so-called "human drop boxes" rather than mailed or delivered in person to the clerk in an illegal ballot harvesting schemed dubbed "Democracy in the Park," through which 17,271 illegal ballots were harvested.
* Wisc. Stat. §$ 6.86(3)(c), 6.87(2) and 6.87(6d), which provide that absentee ballots must be witnessed, and the witness must sign and provide his or her address. If the absentee ballot certification "is missing the address of a witness, the ballot may not be counted." Yet election officials in Dane and Milwaukee counties hand-cured the missing information and then illegally counted those 4,469 ballots.

. . . . [T]he illegal conduct affected significantly more ballots than the margin of victory, and is therefore more than sufficient to warrant the Wisconsin Legislature taking back its plenary power to determine the manner of choosing electors, even to the point of adopting a slate of electors itself. In my opinion, that would be true no matter when the illegality came to light and the Legislature determined to act.

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Section 7 of Title 3 of the United States Code sets the date for the meeting and voting as the first Monday after the second Wednesday in December. . . . Section 6 of the Electoral Count Act of 1887recognizes, though, that the ascertainment of electors certified to cast votes on the designated date must be made "*under and in pursuance of the laws of such State providing for such ascertainment*." The issue presented here is therefore what happens when the certification follows an election that was not conducted "*under and in pursuance of the laws of such State*." . . . Neither state nor federal law provides an answer, and Article II, together with the Supreme Court's interpretation of that provision in *McPherson*, indicates that the Legislature's plenary power over the manner of choosing electors is revived in such a circumstance; otherwise, the "manner" for choosing electors directed by the Legislature, pursuant to its unquestioned constitutional authority, would be rendered a dead letter.

Moreover, as a matter of historical precedent, the certification and casting of votes on the day designated by 3 U.S.C. § 7 is not conclusive. Electors for Vice President Nixon were certified and met to cast their votes following the 1960 election. But when an election challenge in Hawaii was subsequently deemed to have determined that Senator Kennedy rather than Richard Nixon prevailed in Hawaii, electoral votes that had been cast for Senator Kennedy on the designated date (albeit without having been certified) were retroactively certified and, having met the statutory and constitutional requirements of voting on the designated day, were eligible to be counted at the joint session of Congress. As with Hawaii's alternate slate of Kennedy electors in 1960, President Trump's slate of electors met on the designated day and cast conditional votes, ready to be retroactively certified should election challenges or other formal action warrant.

The next significant event on the timeline is the meeting of the joint session of Congress at which the ballots transmitted by the electors are opened and counted. . . . . Some have recently argued that the role of the Vice President, or of the Congress more broadly, is merely ministerial, a ceremonial counting of ballots transmitted. Section 1S of the Electoral Count Act of 1887 doesn't treat the roles as merely ministerial, however, for that section allows for objections to be made and voted upon, even for certified electoral votes that were deemed conclusive under the safe harbor provisions of Sections 5 and 6 if Congress determines they were not "regularly given." Moreover, historical precedent establishes that some judgment must be made as to whether or not to count electoral votes that were of questionable validity (Vermont's votes for Vice President John Adams in 1796; Georgia's votes for Vice President Thomas Jefferson in 1800), and particularly when two sets of electoral votes have been transmitted to Congress (Florida, Louisiana, and South Carolina in 1876; Hawaii in 1960; Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin in 2020).

There is much historical dispute over whether the Twelfth Amendment delegates that judgment authority to the Vice President alone (he "opens" the ballots, and therefore arguably must decide which to open and which "shall be counted," whereas that action is done merely "in the presence" of the House and Senate), or to the joint session of Congress acting as a single body, or to the two houses of Congress acting independently, or even whether it reserves it to the state legislatures pursuant to their authority under Article I. But whoever decides, the decision should be based on the legal validity of the electoral votes, which is to say, which votes were cast according to the "manner" directed by the Legislature of the State pursuant to its Article II plenary authority. When, as happened this past election, the Vice President and/or Congress views its role as merely ministerial and counts electoral votes that were assertedly certified despite illegal or fraudulent conduct in a State that was contrary to the manner" directed by the Legislature of that State, then the Constitution's assignment of plenary power to the state legislatures is undermined.

One must acknowledge that we’re in unchartered territory here. . . . If there is such a [plenary] power derived directly from the Constitution, as the Supreme Court held in *McPherson* and noted again in *Bush v. Gore*, then that grant of power to the state legislatures cannot be constrained by mere statute, either federal or state. The processes set out in the Electoral Count Act would have to give way to the exercise of power conferred elsewhere by the Constitution itself.

The final event on the timeline, and the only one established by the Constitution itself, if January 20 at Noon, the time and day that the Twentieth Amendment fixes for the termination of a President's term and, implicitly, for the inauguration of his successor. Even if the prior certifications could be challenged, the Legislative Council argues that this would be the point of no return because, except in the case of presidential incapacity, impeachment is the only mechanism for removing a sitting U.S. President." The Legislative Council overstates the case, for although the Constitution provides for removal in two instances--conviction after impeachment pursuant to Article II, and temporary removal for incapacity pursuant to the 25th Amendment neither purports to be exclusive, and neither deals with the present circumstance. If we assume for the present discussion that Biden did not actually win the election but that he did not have any involvement in the illegal conduct, then he was not himself engaged in a high crime or misdemeanor for which he could be impeached (and removing him would simply elevate Vice President Harris, another beneficiary of the illegal certification). Neither did the illegal conduct have any connection to any perceived incapacity, so the 25th Amendment is not relevant for the purpose, either. The simply [sic] fact is that the Constitution simply does not address the unchartered territory in which we find ourselves.

In such circumstances, the courts usually look to background principles of the common law to fill in constitutional gaps. One significant common law principle is that actions taken as the result of fraud or illegality are void *ab initio*, and can be rescinded. This principle has been applied to reverse a fraudulent election even after the election was certified and the illegally-certified candidate was sworn in and sitting in the legislature. *Marks v. Stinson* (E.D. Pa. 1994). The Pennsylvania Constitution did not provide any mechanism for removal of a member of the legislature who had been certified pursuant to a fraudulent election, but the fraudulently-elected representative was nonetheless removed from office, the election overturned, and the true winner of the election seated instead. That "[t]here is no process under current law for the Wisconsin Legislature to 'decertify' an election," as the Legislative Reference Bureau claims, does not mean that the Legislature cannot provide a remedy for outcome-determinative fraud and illegality in the conduct of the election, exercising powers it has directly from Article II of the federal Constitution, for as the Supreme Court stated in *McPherson*, "there is no doubt of the right of the legislature to resume the power [to appoint electors] at any time, for it can neither be taken away nor abdicated."

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Finally, there is the issue of whether legislative action would require the governor's signature or a veto override. Article 2 gives the legislature plenary power to determine the manner of choosing elector. . . . The power is similar to that exercised by the legislature when deciding whether to ratify a constitutional amendment. Its vote is final, without the need for approval from the governor pursuant to requirements in the state constitution. That is because the power exercised by the legislature in such a case is not derived from the state constitution but from the federal Constitution, and cannot be constrained by limits imposed by state law.

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1. Office of the Special Counsel, *Second Interim Investigative Report on the Apparatus and Procedures of the Wisconsin Elections System* (March 1, 2022), 136. [↑](#footnote-ref-1)